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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 794

AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.) AND LOCAL NO. 17 OF THE AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.), PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, AND LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 23–45) is reported at 309 F. 2d 31. The Board's decision and order (R. 53–73)[1] are reported at 130 NLRB 985.

JURISDICTION

The decision of the court of appeals was rendered on August 31, 1962 (Pet. 45), and timely petitions for rehearing were denied on November 9, 1962 (Pet. 48).

[1] "R." references are to the Transcript of Record in the court below.

The decree of the court of appeals was entered on December 6, 1962 (Pet. 49). The petition for a writ of certiorari was filed on February 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(e) of the National Labor Relations Act, which makes it an unfair labor practice for an employer and a labor organization to enter into a "hot cargo" agreement under which the employer agrees to refrain from handling products of, or doing business with another employer, is unconstitutional because it exempts from its terms the apparel and clothing industry, but not the lithographic industry.

2. Whether Section 8(e) covers three particular clauses which the petitioner unions demanded in their contract negotiations with respondent employers.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 46–47 of the petition.

STATEMENT

A. The Board's findings of fact

Petitioner Local 17 is the bargaining representative of lithographic employees who work for the 15 employer-members of the respondent Association, as well as for more than a hundred other lithographic employers in the San Francisco and Northern California area (the "Independents") (R. 8–9; 131–133, 135, 368–369). Under customary procedure, Local 17,

with the approval of the International Union, first negotiates a master agreement with the Association and then negotiates separate contracts with each of the Independents containing the provisions of the master agreement (R. 11; 417, 435–439). About August 17, 1959, Local 17 advised the Association and each Independent of its desire to terminate the existing agreement on October 18, 1959 (R. 14; 142–145).[2] Negotiations between Local 17 and the Association began on September 9, 1959, and about 16 bargaining meetings took place between that date and November 20, 1959 (R. 14; 146, 89, 105–106).

Commencing about October 12, 1959, Local 17, with the authorization and approval of the International, demanded that the Association agree to five clauses, which had been drafted to replace provisions of the expiring agreement which were illegal under the recently enacted Landrum-Griffin Act (n. 2, *supra;* R. 14; 195–202, 212, 205, 165, 148, 180–185, 221, 89, 105–106, 152, 163, 174, 269–270, 290–298). The clauses were entitled "Trade Shop Work," "Struck Work," "Chain Shop," "Termination," and "Refusal to Handle" (R. 15–17; 188–202).[3]

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[2] The existing agreement became effective on October 22, 1957, and was subject to termination on October 18, 1959, upon 60 days' notice (R. 14; 137–141, 88, 105, 369, 435–439). It contained "Struck Work" and "Trade Shop" clauses which would clearly have violated the terms of the proposed Section 8(e), which took effect on November 13, 1959 (R. 20–21, 14; 140).

[3] The "Struck Work" and "Chain Shop" clauses are not involved in the proceeding before this Court. Although the Board found that they were violative of Section 8(e), the court of appeals set aside that finding, and the Board has not sought certiorari with respect to that ruling.

The "Trade Shop Work" clause provided (R. 15–16):

> SECTION 22. TRADE SHOP WORK: (a) The parties agree that all the terms of this contract have been negotiated on the assumption that all lithographic production work will be done under approved union wages and conditions. In the event any employer covered by this contract requests any employee to handle any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America and authorized to use the union label of the Amalgamated, then the Union in its discretion by notice in writing, may re-open the contract as to that employer for negotiations as to the whole or any part thereof. In the event of failure to agree on all terms within ten days after such re-opening, the Union shall have the right to terminate the contract forthwith as to that employer by giving written notice to such employer.
>
> (b) Union trade shops must affix the Union label on all their products before sending them to any other shop.
>
> (c) Finished lithographic press plates which are sent out of any plant (unless for regraining) shall have the Union label and the name of the plant in the plate, except that as to plates heretofore made this may be done by otherwise attaching the Union label and name of the plant to the plate. Any negatives or positives sent out of a plant shall bear the Union label and the name of the plant.
>
> (d) Upon request by the shop delegate an employer shall advise him of the source of any

lithographic work brought into the plant from the outside. Such request shall not interfere with the normal production of the plant.

The "Termination" clause provided (R. 16–17):

> SECTION 24. TERMINATION: In the event an employer requests any employee to handle any work described in paragraph (Section 23) above,[4] or requests any employee to handle any work received from or destined for any employer involved in such strike or lockout, directly or indirectly (other than work actually in process in the plant), the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith as to that employer by giving written notice to said employer.

The "Refusal to Handle" clause provided (R. 17):

> SECTION 25. REFUSAL TO HANDLE: The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America or not authorized to use the union label of the Amalgamated or because such employee refused to handle any struck lithographic work of the type described in Sections 23 and 24.

The Association refused to agree to these provisions (R. 17; 212–213, 195–196, 221, 247–256, 264–268). On

[4] Section 23 contained the "Struck Work" and "Chain Shop" clauses (R. 16). These clauses are discussed *infra*, p. 13.

and after October 21, 1959, Local 17 refused to permit its members to perform any overtime work until the Association agreed to the proposals (R. 25; 239–240, 246, 417). On November 20, 1959, the bargaining negotiations reached an impasse with the President of Local 17 threatening that the disputed clauses "had to be put in the contract or there would be no contract" (R. 17–18; 271–272). On November 23, 1959, Local 17, with the approval and support of the International, called a strike of its members and picketing commenced at the plants of the Association members (R. 18; 275, 93–94, 106–107, 230–232, 266–267, 269–270, 284–289).[5]

B. The Board's conclusions and order

The Board concluded (R. 55–62) that the five clauses demanded by petitioners in the 1959 negotiations amounted to an "implied" agreement to boycott nonunion and unfair materials and employers, and hence violated Section 8(e) of the Act. The Board further concluded (R. 65, 41) that petitioners, by striking and instituting an overtime ban to secure clauses banned by Section 8(e) and to cause a cessation of business between the Association members and non-Union employers, violated Sections 8(b)(4)(i) and 8(b)(4)(ii) (A) and (B). Finally, the Board

[5] On January 13, 1960, the district court, in proceedings under Section 10(l) of the Act, found reasonable cause to believe that the clauses sought were violative of Section 8(e) and that the strike was thus illegal. *Brown* v. *Local No. 17, Amalgamated Lithographers*, 180 F. Supp. 294 (N.D. Cal.). The strike thereupon terminated and the parties agreed to a new contract (R. 20; 573).

concluded (R. 66–67, 42–43) that petitioners' strike action and overtime ban to force inclusion of the illegal provisions in the new contract constituted a refusal to bargain, in violation of Section 8(b)(3).*

The Board's order (R. 67–70) required petitioners to cease and desist from the unfair labor practices found, and to post appropriate notices.

C. The decision of the court of appeals

The court of appeals agreed with the Board that the "Trade Shop Work," the "Termination," and the "Refusal to Handle" clauses were violative of Section 8(e) of the Act (Pet. 27–29, 38–39). It held, however, that the "Struck Work" and "Chain Shop" clauses were not unlawful (Pet. 29–37). The court enforced the Board's order insofar as it related to the three illegal clauses, and set it aside insofar as it related to the other two clauses (Pet. 39–45). The court rejected petitioners' contention that the exemption of the apparel and clothing industry from Section 8(e) was arbitrary and rendered the entire provision unconstitutional (Pet. 44).

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict of decisions. No issue warranting review by this Court is presented.

1. Section 8(e), although generally banning agreements whereby an employer consents to cease doing business with another person whom the union dis-

* The Board found an additional violation of Section 8(e) (R. 63–64), which is not relevant here.

favors (so-called "hot cargo" agreements), contains a proviso which exempts "persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry" (Pet. 47). Petitioners contend (Pet. 7–15) that it was arbitrary for Congress to exempt the apparel and clothing industry but not other integrated industries like the lithographic industry, and that, because of this allegedly arbitrary classification, Section 8(e) offends the due process clause of the Fifth Amendment to the Constitution. The court below properly found this contention to be without merit. Its conclusion accords with that of the other courts which have considered the question. See *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 24–27 (C.A. 5); *Brown* v. *Local No. 17, Amalgamated Lithographers of America*, 180 F. Supp. 294, 305–306 (N.D. Cal.).

It is well settled that, in exercising the commerce power, "Congress may choose the commodities and places to which its regulation shall apply * * * [it] may consider and weigh relative situations and needs." *Currin* v. *Wallace*, 306 U.S. 1, 14. See also, *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426. See also, *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584.

The legislative history of Section 8(e) shows that there were rational reasons for the exemption of the apparel and clothing industry. The bill as it passed the Senate only banned "hot cargo" agreements between a union and an "employer who is a common carrier subject to Part II of the Interstate Commerce Act."[7] The provision was so limited on the ground that hot cargo agreements were most frequently utilized by the Teamsters in the trucking industry, and that common carriers by truck, operating under a franchise from the Government, were under a special obligation to serve without discrimination.[8] However, in the House it was pointed out that hot cargo agreements were prevalent, and no more justifiable, in other industries, including the printing industry.[9] Accordingly, the Landrum-Griffin bill, which passed the House, contained a blanket ban on such agreements.[10]

In the Conference Committee, the fear was expressed that, without some qualifying language, the ban would be interpreted as applicable to the apparel and clothing industry, which everyone agreed (even the sponsors of the Landrum-Griffin bill) should not be subjected to such prohibition.[11] That industry operates through a system whereby a jobber buys the

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[7] See 707(a) of S. 1555 as passed by Senate, I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959), 582.

[8] 105 Cong. Rec. 6556–6557; II Leg. Hist. 1161–1163.

[9] See 105 Cong. Rec. 15532 (Cong. Griffin), 15545 (Cong. Rhodes), 15674 (Cong. Bosch); II Leg. Hist. 1568, 1581, 1616.

[10] See 705(b) of H.R. 8400, I Leg. Hist. 683.

[11] See 105 Cong. Rec. 16590–16591 (Analysis prepared by Senator Kennedy and Cong. Thompson), 15848–15849 (Congs. Landrum and Griffin); II Leg. Hist. 1708, 1680–1681.

piece goods and plans the designs and contracts out the cutting and sewing to contractors, whose machines are usually located in a loft and can readily be moved from one location to another. In the past, the industry had been plagued by the sweatshop, for the contractor who signed a contract with the union could easily evade it by contracting out the cutting and sewing to a low wage shop hidden away from the union. Experience had shown that this practice could be checked only by the union inducing jobbers to agree not to do business with contractors who had not signed contracts with the union.[12] To make it clear that the ban on hot cargo agreements was not intended to interfere with these arrangements, the Conference Committee added a specific proviso exempting the apparel and clothing industry from the proscriptions of Section 8(e) (and the companion Section 8(b)(4)).[13]

Petitioners' contention that the apparel and clothing industry exemption is arbitrary misconceives the basis for Congress' action. Petitioners assume that

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[12] *Ibid.*

[13] See 105 Cong. Rec. 17899 (Senator Kennedy), 18134 (Cong. Thompson); II Leg. Hist. 1432, 1721. See also, H. Rep. No. 1147, 86th Cong., 1st Sess. 40, I Leg. Hist. 944.

Another proviso was added exempting certain subcontracting agreements in the construction industry (Pet. 47). This made explicit for that industry what was otherwise implicit in Section 8(e) as a whole. That is, it was not intended that Section 8(e) would apply to typical limitations on subcontracting, which were designed to protect the work of the bargaining unit represented by the contracting union. See 105 Cong. Rec. 17900 (Senator Kennedy), 16590 (Analysis prepared by Senator Kennedy and Cong. Thompson), 18128 (Cong. Barden); II Leg. Hist. 1433, 1708, 1715. See also, H. Rep. No. 1147, 86th Cong., 1st Sess., 39–40, I Leg. Hist. 943–944.

the industry was exempted solely because the jobber and the contractor were in reality an integrated operation, and they argue that there is no justification for failing to accord the same treatment to other integrated operations like the lithographic industry (Pet. 11–13, 14–15). However, as the Fifth Circuit, whose views were adopted by the court below (Pet. 44), pointed out, "the legislative history makes it abundantly clear that reference to the integrated work processes in the garment industry was a limited and somewhat inadequate way of expressing the broader intent and design of Congress to protect an industry peculiarly subject to poor working conditions." *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 26. Even if it be assumed that the degree of integration in the lithographic industry is as close as that between jobber and contractor in the garment industry (which is doubtful), petitioners do not suggest (nor could they) that the lithographic industry was a victim of, or susceptible to, the sweatshop evils which had existed in the garment industry. Congress thus was amply justified in treating the apparel and clothing industry different from the lithographic industry.[14]

2. Petitioners' remaining contentions stand on no firmer footing.

[14] The statements cited by petitioners (Pet. 10, 11, 13, 15), which suggest that the garment industry exemption lacks rational basis, either overlook the considerations set forth above or were made by legislators who opposed extending the hot cargo ban beyond the trucking industry. Cf. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394–395.

(a) The "Trade Shop Work" clause proposed by petitioners provided that, if the employer required an employee to handle lithographic work made in a shop disfavored by the Union, the Union could "re-open the contract as to that employer for negotiations as to the whole or any part thereof," and, if new terms could not be agreed upon within 10 days, the Union could "terminate the contract forthwith." The Board found, and the court below agreed, that an employer who is faced with the possibility of having the contract completely reopened if he handles disfavored work would not voluntarily subject himself to that consequence; and hence that the clause—notwithstanding the disclaimer to the contrary—amounts to an implied commitment not to handle such work (R. 59–60; Pet. 28). Petitioners contend (Pet. 16–17), however, that the purpose of the reopener clause was not to deter the employer from doing business with a non-union firm if he desired, but merely to enable the Union to negotiate more "equitable" contract terms in the light of the employer's changed method of doing business, and that the Board erred in rejecting their offer to prove that such a change would justify the Union in increasing its economic demands. The offer was properly rejected, for, as the court below observed (Pet. 28–29), it would merely tend "to show that it was economically advantageous for the union to have employers refrain from dealing with non-union employers." Under settled principles, economic necessity does not excuse conduct which would otherwise be violative of

the Act;[15] irrespective of the Union's "good" motive, the practical effect of the clause was an agreement of the type which Congress banned in Section 8(e).

(b) The "Termination" clause provided that the Union could terminate the contract "forthwith" if the employer requested an employee to handle any work covered by the "Struck Work" and "Chain Shop" clauses (Section 23),[16] or "any work received from or destined for any employer involved in such strike or lockout." The court below, although finding that the "Struck Work" and "Chain Shop" clauses were not violative of Section 8(e) (n. 16, *supra*), nevertheless held that the "Termination" clause was unlawful. The court stated (Pet. 38): "In validat-

[15] See *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C.A. 9); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C.A. 6).

[16] The "Struck Work" clause provided that the contracting employer would not render assistance to any lithographic employer who was on strike or had locked out his employees and that, in implementation of this purpose, the employees covered by the contract would not be requested to handle any lithographic work "customarily produced" by such employer. The "Chain Shop" clause excused employees covered by the contract from working if their employer or his subsidiary had a strike in another plant. The court below held that both of these clauses were "primary" and thus outside the reach of Section 8(e). The court construed the "Struck Work" clause as embodying merely the so-called "ally" doctrine, which holds that an independent employer loses his neutral position and becomes an ally of the primary employer if he performs work which the primary employer would have done but for the strike (Pet. 29–32). Moreover, the "Chain Shop" clause was held not to violate Section 8(e) because it "is not an undertaking by a primary employer not to handle the work of *another* employer. It constitutes only an agreement by a primary employer not to request his employees to handle *his own* work in any of *his* plants * * *" (Pet. 36).

ing the struck work clause * * * we have construed it as applying only with regard to struck work which is not customarily handled by the primary employer. But this termination clause is not so limited. It applies with regard to 'any' work received from or destined for any employer involved in a strike or lockout of the kind referred to in section 23 * * *, whether such work was 'customary' or 'farmed out' work." Petitioners do not challenge the propriety of this construction, but contend (Pet. 17) that the clause is not unlawful because there is nothing in Section 8(e) "which compels them to continue a contractual bargaining relationship under circumstances which are offensive to a trade union philosophy." This argument overlooks that here, as with the renegotiation and termination provisions of the "Trade Shop Work" clause, the practical effect of the clause was not termination of the agreement but securing an implied commitment from the employer not to do business with a disfavored employer, the evil at which Section 8(e) is directed (see R. 62; Pet. 28–38).

(c) The "Refusal to Handle" clause provided that the employer would not discipline an employee for refusing to handle struck or non-union-goods. Petitioners contend (Pet. 18) that this clause is not unlawful because it merely "preserves to the individual employees the option to handle or refuse to handle certain work." There is no merit to this contention. While an employee has the right to refuse to work for an employer, the employer has the correlative right to require that the employee perform his duties or leave the job. The "Refusal to Handle"

clause requires the employer to bargain away his right to discipline or discharge an employee who refuses to handle non-union products. In these circumstances, the clause amounts to an implied agreement not to handle such products, no less than the other clauses found to be unlawful. For, without employees to perform the task, the employer would have no real alternative to declining to undertake it. See *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 30 (C.A. 5); *Los Angeles Mailers Union No. 9* v. *National Labor Relations Board*, 311 F. 2d 121, 124–125 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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